Supreme Court, U.S.
NOV 5 200

No. 01-404

IN THE

Supreme Court of the United States

WILLIE WHITE and CLARENCE MCCURDY, individually and on behalf of all persons similarly situated,

Petitioners.

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC., SEARS, ROEBUCK AND CO. and ALLSTATE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SEARS, ROEBUCK AND CO.

THOMAS M. CHRISTINA
Counsel of Record
HAYNSWORTH BALDWIN
JOHNSON & GREAVES LLC
Attorneys for Respondent Sears, Roebuck and Co.
Post Office Box 10888
Greenville, SC 29063
(864) 271-7410

170399

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Whether fiduciary duties arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, impose substantive limitations on the terms of a disability benefit plan that would prohibit an employer from (a) adopting a plan that offsets plan benefits by Social Security disability awards and requires reimbursement of the offset amount; or (b) amending the plan's definition of the disability necessary to trigger benefit entitlement.

2. Whether summary judgment dismissing a complaint that alleged breaches of fiduciary duties arising under ERISA is precluded by an affidavit in opposition (a) that does not show that the affiant has personal knowledge of the averments of fact and is competent to testify as to averments in the form of opinions in the affidavit; and (b) that does not purport to contain evidence relevant to the acts alleged to have breached fiduciary duties to the plaintiffs.

LIST OF PARTIES

The parties to this proceeding, in addition to Petitioners, are Respondents Sears, Roebuck and Co.; Allstate Insurance Company; and Metropolitan Life Insurance Company.

Sears, Roebuck and Co. has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions and Orders	1
Statutory Provisions and Rule Involved	1
Statement of the Case	3
Reasons for Denying the Writ	10
I. The First Question On Which The Petition Seeks Certiorari Does Not Merit Review By This Court.	11
A. ERISA Clearly Does Not Impose Substantive Limitations On Plan Sponsors In The Design Or Amendment Of Disability Benefit Plans.	12
B. There Is No Conflict Between The Decision Of The Court Of Appeals In This Case And The Opinion Of This Court In *Varity Corp. v. Howe*, 516 U.S. 489 (1996).	14

Contents

Page

C. If The Petition Seeks Review Of The Disposition Of Petitioners' Claims That The MetLife Policy Was Void, Certiorari As To Issues Bearing On Those Claims Should Be Denied. 16

II. The Second Question On Which The Petition Seeks Certiorari Does Not Merit Review By This Court Because The Record Does Not Clearly Demonstrate Misapplication Of The Standard For Granting Summary Judgment In the Courts Below, The Order Affirming Summary Judgment Is Consistent With The Proper Application Of Federal Rule Of Civil Procedure 56(e), And Resolution Of The Question Would Involve Nothing More Than Application Of The Abuse Of Discretion Standard To A Specific Evidentiary Issue. ... 18

III. The Order Of The Court Of Appeals Affirming Summary Judgment For The Respondents Dismissing Petitioners' Claims Is Subject To Affirmance On Grounds That Are Not Implicated By The Questions On Which The Writ Is Sought. 23

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 81 N.Y. 468 (1880) 17

Carbino v. West, 168 F.3d 32 (Fed. Cir. 1999) 22

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 12, 16

General Elec. Co. v. Joiner, 522 U.S. 139 (1997) ... 22

Hoyt v. Thompson's Ex'r, 19 N.Y. 207, 218 (1859), *writ of error dismissed sub nom. Hoyt v. Sheldon*, 66 U.S. 518 (1862) 17

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510 (1997) 13

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 12, 19

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 19

McCurdy v. Metropolitan Life Ins. Co., No. 96-C-2782-W (N.D. Ala. Mar. 31, 2000) 19, 24

Merryman v. Bourne, 76 U.S. 592 (1870) 20

Cited Authorities

	Page
Mertens v. Hewitt Associates, 508 U.S. 248 (1993)	13
Morgan v. Daniels, 153 U.S. 120 (1894)	20
Multi-Ad Servs., Inc. v. NLRB, 255 F.3d 363 (7th Cir. 2001)	22
Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986)	13
O'Grady v. Howe & Rogers Co., 152 N.Y.S. 79 (N.Y. App. Div. 1915)	17
Sims v. Mulcahy, 902 F.2d 524 (7th Cir. 1990)	22
Tang v. Department of Elderly Affairs, 163 F.3d 7 (1st Cir. 1998)	20
Tchaika Renewal Co., Ltd. v. City of New York, 648 N.Y.S.2d 96 (N.Y. App. Div. 1996)	17
Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999)	22
Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957)	13
The Monrosa v. Carbon Black Exp., Inc., 359 U.S. 181 (1959)	23

Cited Authorities

	Page
The Ship Potomac, 67 U.S. 581 (1862)	20
United States v. Hays, 515 U.S. 737 (1995)	24
Varity Corp. v. Howe, 516 U.S. 489 (1996)	11, 13, 14, 15, 23
White v. Metropolitan Life Ins. Co., No. 00-12227-AA (11th Cir. Sept. 11, 2000)	10
White v. Metropolitan Life Ins. Co., 254 F.3d 75 (11th Cir. 2001) (per curiam)	1
Statutes:	
29 U.S.C. § 1001, *et seq.*	i
29 U.S.C. § 1002(21)(A)	1, 12
29 U.S.C. § 1102(b)(3)	16
29 U.S.C. § 1104(a)(1)	14
29 U.S.C. § 1113	2, 24
N.Y. Bus. Corp. Law § 715(g)	17

Cited Authorities

Page

Rules:

11th Cir. Rule 28-1(j) 21

11th Cir. Rule 36-1 10

Fed. R. App. P. 28(a) 21

Fed. R. App. P. 28(c) 22

Fed. R. Civ. P. 56(c) 19

Fed. R. Civ. P. 56(e) 2, 9, 18, 19, 22

United States Supreme Court Rule 10(a) 18, 20

United States Supreme Court Rule 15.2 12

OPINIONS AND ORDERS

The opinion of the United States District Court for the Northern District of Alabama granting Respondents' motions for summary judgment is not published and appears as Appendix B to the Petition for Writ of Certiorari. The order of the United States District Court for the Northern District of Alabama denying the motion of Respondent Sears, Roebuck and Co. to strike the affidavit of James L. Hand is not published and consisted of the word "Denied" stamped on the face of the motion. The order of the United States Court of Appeals for the Eleventh Circuit affirming summary judgment is published as a table case as *White v. Metropolitan Life Ins. Co.*, 254 F.3d 75 (11th Cir. 2001) (per curiam), and appears in full as Appendix A to the Petition for Writ of Certiorari. The order of the United States Court of Appeals for the Eleventh Circuit denying the petition for rehearing is not published and appears as Appendix C to the Petition for Writ of Certiorari.

STATUTORY PROVISIONS AND RULE INVOLVED

1. Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), provides:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other

property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

2. Section 413 of ERISA, 29 U.S.C. § 1113, provides:

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

3. Federal Rule of Civil Procedure 56(e) provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts

as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

1. Respondent Sears, Roebuck and Co. ("Sears") provided its eligible employees with the annual opportunity to elect or decline long-term disability coverage under the Sears Group-Life and Long-Term Disability Insurance Plan ("the Plan"). The Plan provided that long-term disability benefits were subject to an offset for Social Security disability benefits, and the Plan was administered so that a participant who became eligible for disability benefits under the Plan prior to the determination of his Social Security disability claim would receive unreduced Plan benefits, subject to a duty to reimburse the Plan in the event Social Security disability benefits were granted.

Petitioners White and McCurdy had elected long-term disability coverage for the years in which they subsequently became disabled. They began to receive disability benefits under the Plan, unreduced by any offset, after signing agreements to reimburse the portion of their payments from the Plan that might subsequently be determined not to have been payable due to the receipt of Social Security disability benefits. When Petitioners subsequently were awarded retroactive Social Security disability benefits, however, they refused to reimburse the portion of their Plan benefits representing the Social Security offset. Instead, they brought these consolidated actions in which they alleged that their benefits under the Plan should not be subject to an offset for Social Security disability benefits on the alleged grounds that amendments to the Plan effective in 1989 (that did not alter the substance of the offset provisions of the Plan) were "void ab initio" because "proper corporate procedure was not followed in making said changes," and because the terms of the Plan violated various substantive norms Plaintiffs allege arise under ERISA, or federal common law, or (in some instances) state and federal common law.[1]

2. In 1987 and 1988, Sears insured the Plan's long-term disability benefits under a group policy ("the Allstate Policy") issued by Respondent Allstate Insurance Company ("Allstate"). The summary plan description for the Plan dated September 1987 recited that Sears "reserves the right to modify, amend, or terminate [the Plan] at any time."

---

1. Petitioners' original complaints, filed in the Circuit Court of Greene County, Alabama, and alleging claims under state law, were removed to the District Court, where they were dismissed by the District Court with leave to state a claim under ERISA within 20 days. Despite the Petitioners' continued reference to state law theories of recovery in their amended pleadings, the Petition does not appear to seek review of any question of state law.

As of December 31, 1988, Allstate ceased to be the carrier of the long-term disability policy insuring benefits under the Plan, and effective January 1, 1989, those benefits were insured under a group policy ("the MetLife Policy") issued by Respondent Metropolitan Life Insurance Company ("MetLife"). Many features of the Plan (including the long-term disability benefit formula and the offset for Social Security disability benefits) were unaffected by the change in insurance carriers.

Both before and after January 1, 1989, the Plan had a mechanism to replace the participant's income to the full extent of benefits allowable under the Plan while the participant's Social Security disability income application was pending. Under the terms of the Allstate Policy, the Plan would pay the full amount of benefits under the Plan's benefit formula without regard to the Social Security offset, with a right to recoup the Social Security offset if and when Social Security benefits were awarded, provided that the participant submitted proof within 90 days of the first payment that the participant had applied for Social Security. Under the MetLife Policy, after May 1992,[2] the Plan also paid the full amount of benefits allowed by the benefit formula, subject to recoupment of Social Security disability awards, for participants who submitted proof that their Social Security application was pending. Under both the Allstate Policy and the MetLife Policy, participants were required to execute an agreement promising to restore to the Plan the amount of the overpayment made by the Plan once a retroactive award of

---

2. Between January 1, 1989, and May 1992, estimated Social Security disability benefits were taken into account in calculating Plan benefits. Petitioners became entitled to benefits under the Plan in September 1992 and September 1993, respectively, and therefore were unaffected by the estimated offset approach.

Social Security benefits had been made. Like MetLife, Allstate sought recoupment of retroactively-awarded Social Security payments in a lump sum.

The MetLife Policy defined "Total Disability" differently from the definition applicable under the Allstate Policy in two respects. First, during the initial 12 months of benefit entitlement, benefits were triggered under the Allstate Policy if the participant were unable to perform the material duties of his own occupation, but benefits were triggered under the MetLife Policy only if the participant were unable to perform the duties of his position or any other position for which he was fit, based on education, training, and experience. Second, after the first 12 months of benefit entitlement, a participant would continue to be eligible for benefits under the Allstate Policy if he were unable to perform the material duties of his occupation or any other occupation for which he was reasonably fit by training, education, or experience, whereas under the MetLife Policy, in addition to meeting this standard, the participant must have been approved to receive Social Security disability benefits during the first 12 months of Plan benefits, or (in the case of a Social Security disability benefit approval that is retroactive to the first date of Plan benefit payments), during the 12 months after the Plan benefit ceased.

3. Petitioner White became totally incapable of performing any occupation due to serious illness. He applied for disability benefits under the Plan and signed a reimbursement agreement with Respondent MetLife on September 19, 1992, in which he acknowledged that Plan benefits were subject to reduction for Social Security benefits and agreed to repay any overpayment caused by a retroactive Social Security award. Upon approval of his application, he began receiving unreduced disability benefits under the Plan,

effective as of September 8, 1992, the date of onset of his disability. On March 15, 1994, the Social Security Administration awarded Petitioner White disability benefits, retroactively to his date of disability, as well as prospectively. Petitioner White's Plan benefit was reduced accordingly, and Respondent MetLife sought reimbursement from Petitioner White of the retroactively-calculated Social Security offset amount.

Petitioner McCurdy became totally incapable of performing any occupation due to serious illness. He applied for disability benefits under the Plan and signed a reimbursement agreement with Respondent MetLife on September 17, 1993, in which he acknowledged that Plan benefits were subject to reduction for Social Security benefits and agreed to repay any overpayment caused by a retroactive Social Security award. Upon approval of his application, he began receiving unreduced disability benefits under the Plan, effective as of September 7, 1993. Petitioner McCurdy's application for Social Security disability benefits was not approved within 24 months of his initial receipt of Plan benefits, and his benefit payments under the MetLife Policy were discontinued as of October 1, 1995. In February 1996, the Social Security Administration awarded Petitioner McCurdy disability benefits retroactively to April 20, 1993. After his favorable Social Security determination was received, Petitioner McCurdy's benefits under the Plan for the period following September 1995, were restored retroactively following their suspension.

Both Petitioners refused to comply with demands for reimbursement of the offset amount represented by their Social Security awards.

4. On September 11, 1996, each Petitioner filed a complaint in the Circuit Court of Greene County, Alabama, seeking relief from the substantive terms of the Plan, including the Social Security disability offset provisions, under various state law theories. Following timely removal and dismissal of the complaints with leave to state a claim under ERISA, each Petitioner filed an Amended Complaint in his case, alleging that the 1989 amendments to the Plan were "void ab initio pursuant to the Federal Common Law in that the proper corporate procedure was not followed in making said changes," and that the substance of the Plan's provisions violated (or was otherwise partially unenforceable under) the fiduciary duty provisions of ERISA or various common law doctrines of contract, estoppel, fraud, misrepresentation, ambiguity, and "Breach of Federal Common Law Trustees Duties." Petitioners also alleged in purely conclusory terms, as a separate count, that "numerous sections of the ERISA Statute were violated by the defendants separately and severally . . . [entitling Petitioners to] protection with reference to enforcement of certain provisions of the ERISA statute and/or provisions of the terms of the plan."

Respondents Sears and Allstate answered the Amended Complaint, while Respondent MetLife answered and counterclaimed for the Social Security offset amounts due under the terms of the Plan and the reimbursement agreements. Respondents subsequently moved for summary judgment. Among the papers Petitioners submitted in opposition to the motion for summary judgment was the Affidavit of James A. Hand, a charter life underwriter and insurance broker ("the Hand Affidavit"), setting forth "certain opinions and conclusions concerning the Long-Term

Disability policies that affected the plaintiffs."[3] Among these opinions and conclusions were averments as to the state of mind of employees eligible to elect coverage under the Plan; statements of what employees concluded from written materials provided to them regarding the Plan; a statement that the MetLife Policy was "unconscionable"; statements of what "one would conclude" from a videotape relating to the Plan provided by Sears; and an averment that the MetLife Policy was "more or less an obsolete type of plan."

Invoking the requirements of Fed. R. Civ. P. 56(e), Respondent Sears moved to strike the Hand Affidavit on the grounds that there was no showing of personal knowledge that would permit Mr. Hand to testify as to the assertions of fact contained in the affidavit; that it affirmatively appeared that Mr. Hand had no personal knowledge that would permit him to testify as to certain assertions of fact contained in the affidavit; there was no showing in the affidavit of Mr. Hand's qualifications to opine on any topic other than perhaps selling insurance; that the conclusory statements contained in the affidavit were unsupported by any averments of fact and were

---

3. The Petition characterizes the Hand Affidavit as "undisputed expert testimony." Petition, 7. In fact, the opinions in the Hand Affidavit on which Petitioners would rely in this Court were sharply contradicted by Mr. Hand himself in a subsequent deposition. In its Supplemental Memorandum of Law In Support of Its Motion for Summary Judgment and its Renewed Motion for Summary Judgment, Sears provided the District Court with a summary of the pertinent part of Mr. Hand's deposition testimony — *i.e.*, that the Plan was valuable to any number of people; that under the MetLife Policy the Plan was "a great deal" for people who received a fairly high Plan benefit; that if a person thought rationally, receiving even the minimum benefit under the Plan was a good deal; and that even people who never became disabled derived something of value from the Plan because they received protection.

inadmissible; and that certain conclusions were phrased in such a vague manner that they would be inadmissible. The District Court denied the motion to strike and denied the motions for summary judgment.

Respondents subsequently filed renewed motions for summary judgment. The District Court filed a Memorandum Opinion Granting Summary Judgment, dated March 31, 2000, and entered an Amended Final Judgment on April 11, 2000, granting summary judgment in favor of each Respondent and against the Petitioners. Petitioners appealed the order. On June 19, 2000, the District Court entered a Second Amended Final Judgment stating in part that judgment "is hereby entered" in favor of MetLife on its counterclaims. Petitioners' appeal from the June 19, 2000, order was dismissed for want of jurisdiction. *White v. Metropolitan Life Ins. Co.*, No. 00-12227-AA (11th Cir. Sept. 11, 2000). On September 22, 2000, the District Court entered a Third Amended Final Judgment specifying the monetary relief to MetLife on its counterclaim. On appeal from the Third Amended Final Judgment, the Court of Appeals for the Eleventh Circuit affirmed in a per curiam opinion, citing 11th Cir. Rule 36-1.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it does not raise any important question of law, there is no conflict between the decision of the Court of Appeals and any decision of this Court, the factual issues sought to be raised by the Petition do not merit review by this Court, and the order affirming the grant of summary judgment for the Respondents dismissing Petitioners' claims can be affirmed on bases not implicated by the questions as to which certiorari is sought.

I. The First Question On Which The Petition Seeks Certiorari Does Not Merit Review By This Court.

The first question as to which Petitioners seek certiorari, as stated in the Questions Presented in the Petition, encompasses two distinct issues: whether ERISA imposes substantive restrictions on the terms of disability plans that would prohibit the Social Security offset provisions of the Plan and the more restrictive definition of "Total Disability" in the MetLife Policy, and whether the decision of the Court of Appeals conflicts with this Court's holding in *Varity Corp. v. Howe*, 516 U.S. 489 (1996).[4] Neither presents an important issue of law as to which this Court should exercise its discretionary jurisdiction.

---

4. The Petition recites that "Petitioners also allege that the MetLife Plan is void *ab initio* due to the failure of the Respondents to amend the plan without following the prescribed corporate procedures [*sic*]." Petition, 7-8. Nonetheless, it seems clear that certiorari is sought only with respect to Petitioners' claims that Respondents breached fiduciary duties under ERISA. *See* Petition, i-ii (". . . whether the Eleventh Circuit . . . when Petitioners submitted an undisputed and uncontroverted expert opinion demonstrating multiple breaches of fiduciary duties by Respondents . . . so far departed from the well-entrenched rules of federal judicial procedure that this Court should review the record and the evidence . . .") *and* 12 ("the judgment of the Eleventh Circuit as it relates to the responsibilities and obligations of fiduciaries . . . merits a review by this Court . . ."). In any event, the disposition of Petitioners' claim that the MetLife Policy was void does not raise any issue that merits review by this Court. *See* Part I.C, *infra*.

A. ERISA Clearly Does Not Impose Substantive Limitations On Plan Sponsors In The Design Or Amendment Of Disability Benefit Plans.

The first of Petitioners' Questions Presented asks this Court to rule on the extent to which ERISA (or perhaps federal common law developed under ERISA) might constrain a plan sponsor's choices where the plan sponsor "altered, amended and eliminated certain coverage provisions" in a long-term disability plan and (as Petitioners would have it) "sought to create substantial financial hardship on the Petitioners." Petition, i.[5] To the extent that this is the issue on which Petitioners seek certiorari, the writ should be denied because the answer is already clear.

This Court has ruled that "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). The amendment of a welfare plan to eliminate benefits entirely does not state a cognizable claim under ERISA. *See Id.* at 78. An employer is not constrained by ERISA's fiduciary duties in its exercise of its power to amend an employee benefit plan. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 889-892 (1996) (employer does not act as a "fiduciary," as defined in Section 3(21)(A) of ERISA when amending a plan).

Similarly, there is no federal common law rule under ERISA that imposes a substantive limitation on an employer's

---

5. Pursuant to Supreme Court Rule 15.2, Sears respectfully suggests that Petitioners' first Question Presented contains a misstatement of fact insofar as it could be read to suggest that there was evidence in the record that Sears intended to create a financial hardship for any Plan participant.

ability to adopt or amend the terms of a long-term disability plan, and no such rule should be created. Just as federal common law developed under ERISA cannot contravene the statutory text, *see Mertens v. Hewitt Associates*, 508 U.S. 248, 259 (1993), Sears respectfully submits that no federal common law rule should be adopted under ERISA that would interfere with Congress' goals in enacting ERISA. *See, e.g., Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("Federal common law must be consistent, not only with the language, but also with the policies of the federal statutory scheme in question.") (citing *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456-57 (1957)). Promoting the voluntary adoption of employer-sponsored benefit plans was one of the purposes of ERISA. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (one of Congress' goals in enacting ERISA was to avoid a system under which "administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place"). Adoption of a substantive restriction on the design or amendment of benefit plans as a matter of federal common law would run counter to the Congressional goal of encouraging voluntary adoption of such plans. *Cf. Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) (employer's freedom to reduce benefits by plan amendment encourages the adoption of more generous benefits at the outset).

B. There Is No Conflict Between The Decision Of The Court Of Appeals In This Case And The Opinion Of This Court In *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

Petitioners also seek certiorari to determine whether the Eleventh Circuit "failed to heed or apply" this Court's ERISA jurisprudence "when the Respondents miscommunicated and/or failed to communicate information about the plan to Petitioners." Petition, i. More specifically, Petitioners claim the decision of the Court of Appeals is inconsistent with this Court's decision in *Varity Corp., supra*. Petition, 9-12. There is no conflict between the decision of the Court of Appeals in this case and this Court's opinion in *Varity Corp.*

In *Varity Corp.*, this Court held that "[t]o participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense" violates the statutory duty of loyalty created by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). *Varity Corp., supra,* 516 U.S. at 506. No issue of "deceiving" plan participants is presented on the record in this case — much less an issue of "knowingly and significantly" deceiving plan participants. Petitioners acknowledge that the summary of material modifications announcing the change in carriers for the Plan provided that "this change does not affect the amount of your Group Long-Term Disability Insurance." In fact, there was no change in the amount of coverage under the Plan as the result of the change in carriers and, therefore, there was no misrepresentation or deception. Moreover, the Hand Affidavit contained an averment that the MetLife Policy "is entirely paid for by the employee (and no contribution by the employer)." It follows from Petitioners' adoption of this statement that no actions were taken "to save the employer money." *See Varity Corp., supra*, 516 U.S. at 506.

Furthermore, the record in this case does not implicate this Court's holding in *Varity Corp.* Petitioners do not recall receiving the summary of material modifications announcing the change in insurance carriers, *see* Petition at 3, and alleged that a requested copy of the MetLife Policy had not been provided, and so Petitioners would have been in no position to demonstrate reliance on any misrepresentations alleged to be contained in those documents. Petitioner White testified in his deposition that he never saw an informational videotape regarding long-term disability benefits, and Petitioner McCurdy testified that he could not recall whether he had seen the videotape shown to him at his deposition. The only instance of any claimed "miscommunication" referred to in the Petition is Petitioner McCurdy's claim that he "received a letter from Sears' Human Resource Center stating that 'your long term disability benefits will continue as long as you remain totally disabled and do not exceed the maximum plan benefit.' " Petition, 3 n.1. September 1994 post-dates Petitioner McCurdy's election to be covered under the Plan and the commencement of his receipt of benefits under the Plan.[6]

---

6. In this Court, Petitioners also claim that they were "mistakenly assured that there would be **no change in coverage.**" Petition, 11 (emphasis in original). A determination by a Court of Appeals regarding the significance, if any, of an inaccuracy in a communication to a plan participant arising from a mistake certainly does not conflict with any holding of this Court in *Varity Corp.*

C. If The Petition Seeks Review Of The Disposition Of Petitioners' Claims That The MetLife Policy Was Void, Certiorari As To Issues Bearing On Those Claims Should Be Denied.

To the extent the Petition seeks review of the disposition of Petitioners' claims that the MetLife Policy was "void *ab initio* due to the failure of the Respondents to amend the disability plan without following the prescribed corporate procedures," *see* Petition at 8, certiorari should be denied.

This Court has held that the requirement of ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), that the plan document describe an amendment procedure for the plan, is satisfied in the case of a plan maintained by a corporate employer by a statement that "the corporation" has the power to amend the plan, and that whether a particular amendment was adopted in compliance with the procedure implied by such a description depends upon whether, under applicable corporate law principles, the amendment was approved by persons with the express or implied authority to do so, or was subsequently ratified. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 76-81, 85 (1995). Sears presented the District Court with uncontroverted evidence of execution of the application for the MetLife Policy by an officer authorized by a resolution of its Board of Directors to "execute and deliver . . . contracts, agreements, documents and instruments pertaining to personnel administration," and uncontroverted evidence of execution of an amendment to the MetLife Policy and execution of a summary of material modifications pertaining to the Plan by an officer authorized by its Board "to take any and all action on behalf of the Company relating to any existing or proposed employee benefits." There is no basis to question the sufficiency of

this evidence as proof of adoption of Plan amendments by authorized officers of Sears. *See, gen'ly,* N.Y. Bus. Corp. Law § 715(g).[7]

Sears also presented the District Court with uncontroverted evidence that the terms of the MetLife Policy were placed into effect. In general, under New York law, a corporation may ratify the acts of its agents, and ratification may be inferred even from informal acquiescence in and approval of those acts. *O'Grady v. Howe & Rogers Co.*, 152 N.Y.S. 79, 83 (N.Y. App. Div. 1915), *quoting Hoyt v. Thompson's Ex'r*, 19 N.Y. 207, 218 (1859), *writ of error dismissed sub nom. Hoyt v. Sheldon*, 66 U.S. 518 (1862). Under New York law, where a corporation engages in the mere process of availing itself of an insurance contract, enjoying its benefits, and acting in accordance with its terms, there is sufficient evidence to ratification of the contract. *Bommer v. American Spiral Spring Butt Hinge Mfg. Co.*, 81 N.Y. 468, 473 (1880). In fact, under New York law, acts of a corporation that are in accordance with a contract ratify both the contract and the authority of the officer who entered into it. *Tchaika Renewal Co., Ltd. v. City of New York*, 648 N.Y.S.2d 96 (N.Y. App. Div. 1996).

Sears respectfully suggests that certiorari should not be granted to review the application of settled state law doctrines to uncontroverted facts.

---

7. Sears is incorporated in New York.

II. The Second Question On Which The Petition Seeks Certiorari Does Not Merit Review By This Court Because The Record Does Not Clearly Demonstrate Misapplication Of The Standard For Granting Summary Judgment In the Courts Below, The Order Affirming Summary Judgment Is Consistent With The Proper Application Of Federal Rule Of Civil Procedure 56(e), And Resolution Of The Question Would Involve Nothing More Than Application Of The Abuse Of Discretion Standard To A Specific Evidentiary Issue.

Petitioners' second Question Presented asks this Court "to review the record and the evidence and reverse the judgment" on the grounds that the Court of Appeals "departed from the well-entrenched rules of federal judicial procedure" by affirming summary judgment against them despite their submission of what they characterize as "undisputed and uncontroverted expert opinion demonstrating . . . multiple breaches of fiduciary duties." Petition, ii. Sears assumes that with this question, Petitioners seek to invoke that branch of certiorari jurisprudence represented by Supreme Court Rule 10(a)'s reference to the exercise of this Court's supervisory power in cases where a Court of Appeals has sanctioned a departure from the accepted and usual course of judicial procedures of sufficient magnitude to merit certiorari jurisdiction. *See* Petition, 17 ("If Mr. Hand's opinions are taken to be true and viewing the evidence in a light most favorable to the Petitioners . . . summary judgment was improvidently granted by the district court and affirmed by the Eleventh Circuit.").

This case does not present an instance of misapplication of the standard for granting summary judgment under

Fed. R. Civ. P. 56(c). A motion for summary judgment is properly granted where "there is no genuine issue as to any *material* fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (emphasis added). The Hand Affidavit certainly did not create a genuine issue as to any material fact on Petitioners' fiduciary claims. Statements in the Hand Affidavit directed at the substantive terms of the Plan were utterly immaterial, since an employer does not act in a fiduciary capacity in designing or amending an employee benefit plan. *See Lockheed Corp. v. Spink, supra*, 517 U.S. at 889-92. Statements in the Hand Affidavit directed at the substance of communications with Plan participants were not relevant to communications with the Petitioners themselves. As noted above, Petitioners denied having seen the insurance contracts at the time their actions were filed, cannot recall whether they received the summary of material modifications announcing the change in insurance carriers, and either deny or do not recall seeing the videotape on which the Hand Affidavit comments. *See* 15, *supra*.

Furthermore, the District Court correctly stated the applicable standard for granting summary judgment where the movant has made a prima facie showing that no genuine issue of material fact exists. Under those circumstances, the District Court held that "the burden shifts to the non-movant to overcome that showing by presenting substantial evidence." *McCurdy v. Metropolitan Life Ins. Co.*, No. 96-C-2782-W (N.D. Ala. Mar. 31, 2000), *reprinted in* Petition, Appendix B, 9a (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In light of the District Court's description of the non-moving party's burden to "present[ ] . . . *evidence*," the District Court's opinion should be read to have ruled implicitly that the Hand Affidavit did not meet the requirements of Rule 56(e). *McCurdy, supra*,

reprinted in Petition at 9a (emphasis added). To be sure, the District Court had earlier denied Sears' motion to strike the Hand Affidavit, but a District Court clearly has the authority to reverse its own prior ruling regarding the admissibility of evidence. *See, e.g., Tang v. Department of Elderly Affairs*, 163 F.3d 7, 11 (1st Cir. 1998). To interpret the action of the District Court otherwise presumes that the District Court regarded the Hand Affidavit as admissible on the renewed summary judgment motion but simultaneously chose to ignore it, which is to presume a potential error when the District Court's opinion is clearly capable of being interpreted to be free from such an error. Error should not be presumed, and the opinion of the District Court should be interpreted not to reflect error. *Cf. Morgan v. Daniels*, 153 U.S. 120, 123-24 (1894) (the judgment of the court below is assumed to be correct until the contrary appears). "It is not sufficient to produce a record from which it does not appear whether it is right or wrong." *The Ship Potomac,* 67 U.S. 581, 584 (1862). Error is not to be presumed but must be affirmatively shown, and all doubts are to be resolved in favor of a judgment rather than against it. *Merryman v. Bourne*, 76 U.S. 592, 600 (1870).

Furthermore, there is no meaningful sense in which the Court of Appeals could be said to have "sanctioned . . . a departure" by the District Court from "the accepted and unusual course of judicial proceedings" on a motion for summary judgment, even if one were to assume that the Hand Affidavit demonstrated the affiant's competence to testify in opinion form and the affiant's personal knowledge of averments of fact, that it contained admissible evidence raising a genuine issue of material fact, and that the District Court consciously chose to ignore it. *Cf.* Supreme Court Rule 10(a). In the portion of its initial brief before the Court

of Appeals styled "Argument," Petitioners did not argue that the District Court had erred, in ruling that there was no genuine issue of material fact, by failing to consider the Hand Affidavit. Brief and Argument of Appellants Clarence McCurdy And Willie White, Individually And On Behalf Of All Persons Similarly Situated, 27-29. To be sure, Petitioners quoted the Hand Affidavit in its entirety elsewhere in their Argument, but there the Hand Affidavit was invoked to support the proposition that "The Met Life Plan and the Changes Met Life made and Sears Agreed to, are unconscionable." *Id.*, 14-21.[8] It was not until their reply brief

---

8. In the portion of their Eleventh Circuit brief styled "Summary of Argument," Petitioners claimed to contend that the Hand Affidavit, along with various other documents submitted in the case, "clearly present substantial evidence and create genuine issues of material fact regarding every Count" in Petitioners' Amended Complaints "with the possible exception of Count Three relating to Federal Common Law Estoppel." *Id.*, 13. However, this contention is not reflected in the portion of their brief styled "Argument." It is apparent that the Court of Appeals for the Eleventh Circuit regards strict fidelity of the summary of the argument to the argument itself as a matter of importance. *Compare* Fed. R. App. P. 28(a) *and* subdivision (8) ("The appellant's brief must contain . . . (8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief . . .") *with* 11th Cir. Rule 28-1(j) ("The opening briefs of the parties shall also contain a summary of argument, suitably paragraphed, which should be a clear, accurate and succinct condensation of the argument *actually* made in the body of the brief.") (emphasis added). Limiting an appellant to the arguments advanced in the body of the argument certainly would be an appropriate method of enforcing the strict fidelity requirement of 11th Cir. Rule 28-1(j), and there does not appear to be any reason for this Court to require a Court of Appeals to regard an argument as having been advanced on appeal where it appears only in a purported summary of an argument and not in the argument itself.

in the Court of Appeals that Petitioners argued that "The Testimony Of Expert Witness James A. Hand Demands Reversal" and that "Eleventh Circuit Reverses Summary Judgments Where Expert Testimony Creates Material Issues Of Fact." Reply Brief Of Appellants Clarence McCurdy And Willie White, Individually And On Behalf Of All Persons Similarly Situated To Briefs Of Appellee, Sears, Roebuck & Company, Metropolitan Life Insurance Company, Inc. And Allstate Life Insurance Company, Inc., 2, 10. Thus, far from sanctioning a departure by the District Court from accepted practice, the Court of Appeals may simply have been enforcing the well-recognized principle that an argument raised for the first time in a reply brief will not be considered. *See, e.g., Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 370 (7th Cir. 2001) ("It is well-settled that parties may not raise new arguments or present new facts for the first time in reply.") (citing Fed. R. App. P. 28(c) and *Sims v. Mulcahy*, 902 F.2d 524, 536 n.5 (7th Cir. 1990)); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 & n.52 (5th Cir. 1999); *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999).

Finally, the question of the admissibility of expert testimony on a motion for summary judgment is reviewable under the abuse of discretion standard. *General Elec. Co. v. Joiner*, 522 U.S. 139, 143 (1997). There certainly was no abuse of discretion in treating the Hand Affidavit as inadmissable given its facial non-conformity with the requirements of Rule 56(e). Moreover, application of the abuse of discretion standard to the specifics of the Hand Affidavit would not involve principles of broader importance justifying exercise of this Court's discretionary jurisdiction.

III. The Order Of The Court Of Appeals Affirming Summary Judgment For The Respondents Dismissing Petitioners' Claims Is Subject To Affirmance On Grounds That Are Not Implicated By The Questions On Which The Writ Is Sought.

Where the order as to which review by certiorari is sought would be affirmed on grounds other than the ground on which review is sought, certiorari should be denied. *Cf. The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 181, 182-85 (1959) (writ of certiorari to review whether action in personam maintainable dismissed as improvidently granted where record revealed that libel in rem to recover the same amount was maintainable). In this case, affirmance would be justified on at least two grounds not raised in the Petition — limitations and standing.

The gravamen of Petitioners' fiduciary claims was that the terms of the Plan themselves violated ERISA's fiduciary duty provisions.[9] Petitioners do not seek certiorari with respect to any claim relating to the administration of the Plan.[10] The effective date of the MetLife Policy was January 1,

---

9. As noted above, the Petition seeks certiorari only with respect to issues bearing on alleged breaches of fiduciary duties under ERISA. *See* note 4, *supra*.

10. The formulation of the first of Petitioners' Questions Presented contains the premise that "Respondents miscommunicated and/or failed to communicate information about the plan to Petitioners." Petition, i. Certainly, under some circumstances, non-communication or miscommunication of some kinds of information regarding an ERISA-governed plan raise questions of plan administration. *See, e.g., Varity Corp.*, 516 U.S. at 502. However, Respondent Sears respectfully suggests that no question regarding non-communication or miscommunication of the Plan's terms is presented in this case.

(Cont'd)

1989.[11] The terms of the Allstate Policy were in effect before January 1, 1989. Petitioners' actions were commenced more than six years later, well outside the limitations period for fiduciary claims. ERISA § 413, 29 U.S.C. § 1113. Therefore summary judgment dismissing Petitioners' fiduciary claims was properly granted, notwithstanding the issues as to which Petitioners seek review here.

In addition, insofar as they sought to litigate the legality of the changes in the terms of the Plan resulting from the adoption of the MetLife Policy as a substitute for the Allstate Policy in 1989, Petitioners failed to satisfy the "case or controversy" requirement of Article III, Sec. 2. The "irreducible constitutional minimum" for Article III standing requires the presence of three elements: (1) the plaintiff must have suffered an injury in fact — that is, the invasion of a legally protected interest which is "concrete and particularized;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 742-43 (1995) (citations omitted). It is undisputed that Petitioner

---

(Cont'd)

The District Court found as an undisputed fact that "the changes in the Sears Plan accompanying its switch to MetLife were distributed in 1989 to all of the Plan's participants, including Plaintiffs." *McCurdy v. Metropolitan Life Ins. Co.* (N.D. Ala. Mar. 31, 2000), *reprinted in* Petition, at 6a. Petitioners did not contest this finding in the Court of Appeals. As to Petitioners' lack of reliance on any documents alleged to contain misrepresentations, *see* 15, *supra*.

11. The application for the MetLife Policy was executed by an authorized officer of Sears on February 23, 1990, more than six years prior to the commencement of Petitioners' actions.

White's rights under the Plan were not affected adversely by any change in the terms of the Plan that resulted from the adoption of the MetLife Policy. Petitioner McCurdy's Plan benefits were suspended for five months when his claim for Social Security disability benefits remained pending after 24 months of Plan benefits, but before his action was commenced, Social Security disability benefits were awarded to him and Plan benefits were reinstated retroactively to the date of their suspension. Thus Petitioner White suffered no injury in fact as the result of the adoption of the MetLife Policy, and Petitioner McCurdy cannot show that any injury he may have suffered would be redressed by a judgment that any provision of the MetLife Policy that differed from the corresponding provision of the Allstate Policy was invalid.

CONCLUSION

For all of the foregoing reasons, Respondent Sears, Roebuck and Co. respectfully requests that the Petition be denied.

Respectfully submitted,

THOMAS M. CHRISTINA
Counsel of Record
HAYNSWORTH BALDWIN
JOHNSON & GREAVES LLC
Attorneys for Respondent
Sears, Roebuck and Co.
Post Office Box 10888
Greenville, SC 29063
(864) 271-7410